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JOSEPH F. SPANIOL, JR.
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90-20

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

STATE OF HAWAII, Petitioner

v.

JOHN KALANI LINCOLN, Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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Respondent John Kalani Lincoln hereby opposes the petition for writ of certiorari filed herein and respectfully submits that the petition should be denied.

Jurisdiction

For the reasons stated herein Respondent submits that this Court does not have jurisdiction to review and disturb the judgment of a state court which was predicated upon adequate and substantial state grounds, and in deference to the proper authority of the Supreme Court of the State of Hawaii the petition for writ of certiorari herein should be denied.

Constitutional and Statutory
Provisions Involved

The Sixth Amendment to the United States Constitution provides in relevant part that

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that

No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 14 of the Constitution of the State of Hawaii provides in relevant part that

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused . . .

Rule 802, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes, provides that

Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Hawaii supreme court, or by statute.

Rule 804(b)(1) and (6), Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes, provide that

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or an-

other proceeding, at the instance of or against a party with opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

- (6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . .

Statement of the Case

On May 4, 1978, Anthony Kekona, Jr., and Patrick Hawkins went to the Kaleialoha Condominium in Honokowai, Maui. Upon entering apartment 404 Kekona brandished a handgun and demanded drugs and money. When only small amounts of cash and marijuana were produced, Kekona demanded more. At that point Paul Warford said "this has gone far enough" and made a move toward Kekona. Kekona shot Warford and then, in rapid succession, shot and killed David Blue and seriously wounded Harriet Savage.

Patrick Hawkins was apprehended a short distance away and was returned to the Kaleialoha Condominium where

Harriet Savage saw and identified him. After making several written and oral statements to the police in which he denied any intention or plan to harm the victims, Hawkins named Anthony Kekona as the gunman.

Kekona was arrested several days later in Honolulu as he was preparing to flee to the mainland. One year later, on July 30, 1979, Kekona plead guilty and was sentenced for the murders of Paul Warford and David Blue and the attempted murder of Harriet Savage. At his sentencing Kekona described the incident as a robbery that went "haywire" and gave no indication that persons other than himself and Hawkins were involved in the crimes.

Within hours after his sentencing, however, Kekona made a lengthy tape-recorded statement for his uncle, Maui police detective Robert "Ace" Cordero, in which, for the first time, Kekona claimed that he had been hired by John Kalani Lincoln to kill Warford, Blue, and Savage. Kekona told Cordero that the contract price was \$10,000.00, that Lincoln promised to provide a lawyer and take care of any witnesses if Kekona were caught, and that Kekona would receive subsequent jobs -- "the hits on Maui".

Based upon Kekona's, "new information," Maui County authorities reopened their investigation and launched a massive effort to implicate Lincoln and other unnamed parties in whose behalf Mr. Lincoln was believed to have

acted. More than forty persons -- police, deputy prosecutors, and other persons -- were pulled into the case, and the county incurred extraordinary expenses in a relatively short period of time. Based upon sworn testimony of Kekona and Maui detective Gary Danley the authorities sought and obtained a wiretap upon Mr. Lincoln's home telephone after falsely telling a state court judge that the tap was essential because there were no other suspects and no other viable means to conduct their investigation.

Although John Lincoln was not the primary object, or even the target, of the wiretap, his telephone conversations were overheard and taped for a period of several days, including discussions with his wife and his attorney.

On August 23, 1979, while the tap was in place, Maui authorities falsely announced the escape of Anthony Kekona, who then proceeded to call Mr. Lincoln's home and issue threats to him and his wife. At the direction and under the supervision of Maui police and prosecutors Kekona unsuccessfully tried to elicit incriminating statements from Mr. Lincoln and to induce evidence of other persons who allegedly were responsible for the Honokowai crimes. Mr. Lincoln notified Honolulu police about the telephone calls and attempted to arrange a meeting with Kekona at which the Honolulu police could recapture him, but, of course, Kekona did not appear.

On September 6, 1979, while he was still supposedly at large, Kekona appeared and testified before a grand jury concerning his allegations against Mr. Lincoln. Then after it was announced that Kekona had been "apprehended," another grand jury returned and falsely swore to "a true bill" indicting Kekona for escape. A circuit court judge approved of the grand jury's participation in the indictment scheme even though the procedure severely compromised the entire grand jury process.

Eventually on October 24, 1979, Mr. Lincoln was indicted upon two counts of "murder for hire" and a third count of attempted "murder for hire." He surrendered himself to the police voluntarily and was held without bail.

Mr. Lincoln's counsel moved to quash and/or dismiss the indictment objecting, inter alia, to the murder "for hire" language and arguing that the actual offense was murder. The prosecutor conceded that although there is no offense of "murder for hire" in Hawaii the objectionable language was "mere surplusage and will not vitiate the indictment." However, the prosecution requested -- and the jury was given -- instructions as to both "murder for hire" and the so-called "lesser included offense of murder," and the jury acquitted Mr. Lincoln of the charges that he had hired Kekona to kill Paul Warford and David Blue. The jury convicted him of the two "lesser included" counts of "mur-

der" and of the attempted murder of Harriet Savage.

The court sentenced Mr. Lincoln to concurrent terms of life imprisonment with parole and twenty years, and the judgment was affirmed on appeal. State v. Lincoln, 3 Haw. App. 107, cert. denied 64 Haw. 689 (1982).

In late 1982, Anthony Kekona submitted an unsolicited sworn affidavit in which he recanted his trial testimony and reasserted that only he and Hawkins had been involved in the crimes. Kekona stated that John Lincoln had no connection with the shootings and that his only contacts with Mr. Lincoln involved marijuana transactions in which they collaborated. Eventually a hearing was held upon Mr. Lincoln's motion for a new trial, but at that time Kekona recanted his recantation, claiming he only wanted a free trip back to Hawaii to see his family.

In January, 1987, the United States Court of Appeals ruled that there were four potential grounds for setting aside Mr. Lincoln's convictions and directed the District Court to conduct further hearings to determine whether a new trial was required. Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). Following a hearing on just the first of those four issues, the Honorable Samuel P. King, United States District Judge, held that the prosecutor had commented impermissibly upon Mr. Lincoln's failure to testify in his own defense. Judge King thereupon issued a

Decision and Order on August 17, 1987, directing that Mr. Lincoln be retried or set free within 120 days. Lincoln v. Sunn, 674 F. Supp 788 (D.Hi. 1987).

The retrial commenced on January 17, 1989. Despite the previous acquittals of "murder for hire," the prosecutor repeatedly told the jury that the sole issue was whether Lincoln had "hired" Kekona to shoot the three victims.

Kekona was called as a prosecution witness and refused to testify. Patrick Hawkins did not appear. Over strenuous objections by the defense, the prosecutor was permitted to read Kekona's and Hawkins' 1980 testimony to the jury.

In his closing argument the prosecutor strenuously attacked Kekona -- his own witness -- referring to him as "not fit to be called a human being" and "a man completely without morals." The prosecutor then told the jury "you should not totally disregard Kekona's statements because of the type of person he is."

After first announcing that it was hopelessly deadlocked, the jury continued to deliberate. After several days the jury returned verdicts acquitting Mr. Lincoln of the murder of David Blue and the attempted murder of Harriet Savage, and convicting him of the murder of Paul Warford. That conviction was set aside by the Hawaii Supreme Court on

the ground that Kekona's prior unreliable testimony was admitted erroneously without any opportunity for cross-examination before the triers of fact. Without the critical testimony of Kekona the Hawaii Supreme Court said, "[t]he evidence against Lincoln is flimsy."

A third trial has been scheduled for October 8, 1990, at which time the prosecution plans to call Anthony Kekona as its star witness. For this occasion the state has concluded "an understanding" with Kekona, as evidenced by the affidavit and letter attached hereto as Appendices A and B.

Reasons for Denying the Writ

The judgment of the Hawaii Supreme Court is based upon independent and sufficient state grounds and is consistent with that Court's previous interpretations of applicable state constitutional and statutory provisions. The decision below also is consistent with and implements this Court's decisions in Ohio v. Roberts, 448 U.S. 56 (1980), and Chambers v. Mississippi, 410 U.S. 284 (1973), inter alia.

A. The Judgment Below Rests Upon Independent and Sufficient State Grounds.

In its decision below the Hawaii Supreme Court did nothing more than reiterate the truism that exceptions to the state's hearsay rule shall not be applied blindly

when the proffered hearsay evidence is unreliable. Citing to its own decisions in which the reliability of the earlier testimony was not at issue, the Hawaii Supreme Court held simply that in state criminal trials a defendant's right to confront critical witnesses may not be compromised by the use of previous testimony that is or was unreliable.

In the instant case Kekona's 1980 testimony was riddled with inconsistencies and directly contrary to his earlier statements in and out of court. Kekona himself lost track of the number of times he lied in these proceedings. Mr. Lincoln's acquittal of "murder for hire" suggests that the first jury rejected a substantial portion of Kekona's testimony.

Then in 1982 Kekona recanted his testimony under oath, stating that Respondent Lincoln was not involved in the shooting of Paul Warford, David Blue, and Harriet Savage. And in 1984 Kekona recanted his recantation -- again under oath.

In short, Kekona has demonstrated clearly that he is "not fit to be called a human being" and is "a man completely without morals," as the prosecutor so aptly described him. Under no definition of the term can Kekona's prior testimony be characterized as "reliable." By rejecting its use at the second trial, without confrontation before the triers of fact, the Hawaii Supreme Court sought

only to establish a sufficient level of trustworthiness for the admissibility of hearsay evidence to insure the fairness of criminal trials in the courts of the State of Hawaii.

B. The Hawaii Supreme Court's Reading of this Court's Decisions Was Appropriate and Correct


In Chambers v. Mississippi, 410 U.S. 284, 298 (1973), this Court criticized the mechanistic application of the rules of evidence and counselled an approach "based upon experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." And in Ohio v. Roberts, supra, the Court held that the right to confrontation may be curtailed in circumstances where "the ultimate integrity of the fact-finding process" is not compromised, but warned that evidence which is admitted without confrontation must be "marked" with "particularized guarantees of trustworthiness." Ohio v. Roberts, supra, at 65-66.

In its reliance upon Chambers v. Mississippi, supra, and Ohio v. Roberts, supra, the Hawaii Supreme Court rejected the use of patently untrustworthy evidence which had been admitted by the trial court without any consideration for its reliability. Since Kekona's prior testimony may, indeed, have tipped the scales in an otherwise "flimsy" case, the Hawaii Supreme Court held correctly that its use severely compromised the integrity of the trial

court's fact-finding process. Because the opinion below is entirely consistent with all of the relevant decisions of this Court it is submitted that the instant petition for writ of certiorari is groundless and should be denied.

Conclusion

For all of the reasons stated above, the Court should deny the petition for writ of certiorari.

A handwritten signature in dark ink, appearing to read 'E. Seitz', is written above a horizontal line.

ERIC A. SEITZ
Attorney for Respondent

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Attorneys for the State of Hawaii

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

STATE OF HAWAII)	CR. NO. 5720(1)
)	
vs.)	COUNT IV: MURDER
)	
JOHN KALANI LINCOLN,)	AFFIDAVIT OF
)	ANTHONY KEKONA, JR.
Defendant.)	
_____)	

AFFIDAVIT OF ANTHONY KEKONA, JR.

STATE OF INDIANA)	
)	SS.
_____ COUNTY)	

ANTHONY KEKONA, JR., being first duly sworn upon
oath, hereby deposes and says:

1. That I am currently an inmate at the United
Federal Penitentiary at Terre Haute, Indiana, serving a
sentence of life imprisonment with the possibility of parole for
what I did on May 4, 1978;

2. That on May 4, 1978, I shot and killed Paul Warford and David Blue. On that date I also shot Harriet Savage in the head;

3. That in July 1979, I pled guilty to two counts of murder, and one count of attempted murder for what I did on May 4, 1978;

4. That prior to May 4, 1978, John Kalani Lincoln gave me money and told me to shoot Paul Warford, David Blue and Harriet Savage;

5. That I hereby promise that I will testify in Lincoln's upcoming retrial, and will tell the truth to the jury as to the facts about how Lincoln hired me to shoot Paul Warford, David Blue and Harriet Savage, and also to what happened after the shootings between Lincoln and myself;

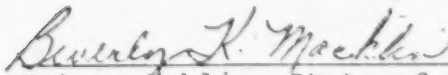
6. That I will not invoke my Fifth Amendment right against self-incrimination on any matter that the Judge says I must testify to; and

Further Affiant sayeth naught.

State of Indiana
County of Vigo


ANTHONY KEKONA, JR.

Subscribed and sworn to before me
this 23rd day of May, 1990.


Notary Public, State of Indiana

My commission expires: 12-01-93

Resident of Vigo County - 2



WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 548-4740
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May 23, 1990

HAND DELIVERY

Anthony Kekona, Jr.
Inmate
U.S. Penitentiary
Terre Haute, Indiana 47808

Re: State v. John Kalani Lincoln,
Cr. No. 5720(1); Count IV: Murder

Dear Mr. Kekona:

Due to the Supreme Court of Hawaii's reversal of Lincoln's conviction for the murder of Paul Warford, we must retry Lincoln.

In exchange for your truthful testimony regarding Lincoln's hiring of you to "hit" Paul Warford, we are willing to make arrangements for you to be housed in Hawaii for the duration of your sentence.

You would be housed initially in Halawa High Security Facility. Pending good behavior and in the normal course, you would eventually be transferred to less secure facilities, such as Halawa Medium Security Facility, Oahu Community Correctional Center, or otherwise as determined by the Department of Corrections.

The Department of the Attorney General will not agree to "cut" your prison sentence, nor will we agree to an early parole date. Your cooperation in terms of truthful testimony, will, however, be brought to the attention of the Hawaii Paroling Authority since they have, in fact, the ultimate responsibility to determine your release or parole date.

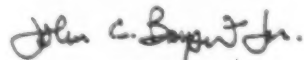
APPENDIX B

Anthony Kekona, Jr.
May 23, 1990
Page 2

In summary, you will be initially housed at the Halawa High Security Facility in exchange for your truthful testimony at the trial against John Kalani Lincoln. Your continued stay in Hawaii will depend on the truthfulness of your testimony and your own good behavior. Should we get any indication that you are not testifying truthfully, or that you are involved in any misconduct, you are subject to be returned to your original place of incarceration.

You should also understand that there will be no other negotiations to reach an agreement for your truthful testimony. All terms of any agreement which we are willing to offer are in this letter. There will be no other terms.

Very truly yours,



John C. Bryant, Jr.
Deputy Attorney General
Criminal Justice Division

JCB:md
1689K

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that one copy of the within
was duly served this date by hand-delivery upon the follow-
ing at the address listed below:

JOHN C. BRYANT, ESQ.
STEVEN S. MICHAELS, ESQ.
Deputy Attorneys General
State of Hawaii
Room 214, Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, July 25, 1990.

A handwritten signature in dark ink, appearing to read 'E. Seitz', is written over a horizontal line.

ERIC A. SEITZ